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No. 1041

In the
Supreme Court of the United States
OCTOBER TERM, 1964.

ABRAHAM F. ZIMMERMAN,
Petitioner,

vs.

JOHN M. LEHMANN, DISTRICT DIRECTOR IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Abraham F. Zimmerman, prays that a Writ of Certiorari be issued to review that portion of the decision of the United States Court of Appeals for the Seventh Circuit in the above case, which rejected his claim to citizenship through his adoptive father.

JUDGMENT AND OPINION OF THE COURT BELOW.

Appeal was taken to the United States Court of Appeals for the Seventh Circuit from the entry of a Summary Judgment in favor of the Respondent, approving the de-

terminations of the Immigration Service that this Petitioner was an excludable alien under the provisions of 8 USC 1182(a)(9). On that appeal, in a decision issued January 7, 1965, the decision of the United States District Court for the Northern District of Illinois, Eastern Division, was reversed, the Court finding that Petitioner's brief excursions outside the country's borders in 1952 and 1953 did not subject him to the consequences of "entry" on his return, under Section 1101(a)(13), Title 8 U.S.C.A. of the Immigration and Nationality Act of 1952, in accordance with this Court's decision and definition of "entry" in *Rosenberg* v. *Fleuti*, 374 U.S. 499.

On the appeal the Petitioner made a claim to citizenship based on the Act of March 2, 1907, Section 5 (Title 8 U.S.C.A. Section 8) which claim was, over the objection of the Government, entertained by the Court of Appeals as a jurisdictional issue "inasmuch as the proceedings were instituted and the order of exclusion obtained on the basis that plaintiff was an alien, not a citizen." (App. 4a). The Court of Appeals in the said decision of January 7, 1965, rejected this Petitioner's claim.

The opinion of January 7, 1965, is not as yet reported, but appears in the printed appendix filed with, and certified by the Clerk of the United States Court of Appeals as a part of this record and transmitted herewith.

JURISDICTION.

The Order of the United States Court of Appeals for the Seventh Circuit, reversing the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, but rejecting this petitioner's claim to citizenship, was filed on the 7th of January, 1965. This petition is filed within 90 days of that order. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Do the terms "child" and "parent" in naturalization statutes include adopted children and adoptive parents, unless specially limited to natural children and natural parents?

STATUTE INVOLVED.

Act of March 2, 1907, Section 5, (8 U.S.C. Section 8):

> "A child born without the United States of alien parents shall be deemed a citizen of the United States by naturalization of or resumption of American citizenship by the parent, wherein such naturalization or resumption takes place during the minority of such child. The citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."

STATEMENT OF THE CASE.

This case involved an appeal from a summary judgment in favor of the respondent upholding an order of exclusion as to this petitioner. While the order of exclusion was reversed by the United States Court of Appeals for the Seventh Circuit, a claim of citizenship under the provisions of the Act of March 2, 1907, Section 5 (Title 8 U.S.C.A. Section 8) was rejected. This petition prays the Court to issue its Writ to review the rejection of the citizenship claim made by the Petitioner.

STATEMENT OF FACT.

The events which led to the exclusion order are not pertinent here, and will be omitted. The facts, upon which the claim to citizenship is predicated, are accurately and concisely set forth in the opinion of the United States Court of Appeals for the Seventh Circuit.

The petitioner was born in the City of Proskroff, Russia, on September 16, 1902. His mother, Adele Rothberg Zimmerman died at his birth. His father, Morris Zimmerman, died in 1911. The petitioner entered the United States at New York, New York, on September 29, 1913, at which time was lawfully admitted for permanent residence. His claim to citizenship is based on the premise that shortly after his admission for permanent residence he was legally adopted in Fort Wayne, Indiana, by his uncle, Isadore Lande, although he continued to use the name Zimmerman. In 1913, when the Petitioner was 20 years of age, Isadore Lande became a naturalized citizen at Flint, Michigan. Thus, this Petitioner contends he, as an adopted child, acquired citizenship by reason of the naturalization of his adoptive parent. (App. 3a-4a)

REASONS FOR GRANTING THE WRIT.

This Court should exercise its jurisdiction in this case for the following reasons:

1. The interpretation of "child" and "parent" in Nationality Statutes, controlling the important issue of citizenship, and effecting an entire class of United States residents, is a question of federal law which has not been, but should be settled by this Court.

I.

It is the position of this Petitioner that there is no provision or policy of law on which citizenship is withheld from a child whose adoptive parent has been naturalized. If he may otherwise fit within the plain reading of the law, and is not specifically excepted, he is a citizen of the United States. This Petitioner falls directly within the provisions of the Act of March 2, 1907. He was born without the United States of alien parents. After his adoption, his adoptive parent became naturalized, and

that naturalization took place during the minority of the petitioner. The petitioner has resided in the United States during his minority and most of his life.

The Court of Appeals for the Seventh Circuit noted in its decision that construction of the Act of March 2, 1907 found no a in any federal case or in the leglislative history. But, in reliance upon two opinions of the Attorney General, 38 Op. Att. Gen. 217 and 38 Op. Att. Gen. 397, that Court adopted the view that there is no statute which bestows American citizenship upon adopted aliens. The Attorney General, in his opinions cited by the Court, reasons that the Act was a reenactment of earlier Acts, the first being the Act of 1802. He reasoned that, since there was no substantial change in the reenactment, and since there was no such thing as legal adoption in 1802, the Congress could not have contemplated adopted children coming within the scope of the act. Therefore, though every state in the union had legalized adoption since around the middle of the 19th century, some 50 years before the Act of March 2, 1907, the Congress would none the less be considered of the same mind as it was a century before in 1802. We think there is no basis for any assumption that the Congress, in changing times, and changing circumstances, should be considered to have remained mentally static for a century. We submit it must be considered to have adapted to the change. Cf. *Goss* v. *Bomar*, 6 Cir., 337 F.2d 341, 342.

Moreover there is no authority to indicate that the Congress considered that ad d children were not recognized and not accorded rights nd privileges equal to those of natural children prior to the legal adoption statutes by the states. In fact, the authorities are to the contrary.

The available authorities clearly indicate the recognition of adopted children.

T. Richard Witmer, identified as counsel for the House Committee on Interior and Insular Affairs, in defining the purpose of the American adoption laws stated:

> "The chances are that the advent of these [adoption] statutes, landmarks though they may now seem to us, created little stir because they were then looked upon as little more than a normal and desirable next step in a development that was already taking place." *Independent Adoptions,* by Helen L. Witner and others, 1963, p. 19.

Mr. Witmer went on to point out that the Oxford English Dictionary traced the word "adoption" and its cognates back to the 14th century with a meaning close to that assigned to it today, namely, the taking of another into relationship with oneself that the other did not previously occupy.

While the Attorney General in his opinions recognized the practice of adoption under Roman Law and the Code Napoleon (38 Op. Gen. 217, 219), he chose to distinguish their provisions from those of the enactments of the mid 19th century legal adoption laws, and, thus, discarded them as any authority for vesting adopted children with citizenship by virtue of the naturalization of the adoptive parent. Mr. Witmer tells us that Mr. Justice Holmes, in *The Common Law* (Oliver Wendell Holmes, Jr., 1881, p. 1) was more impressed by the existence of those laws.

> "These cases make it reasonably clear that the enactment of the first general adoption laws was not the completely novel step it might seem to have been. The standards embodied in many of the first laws were quite similar to standards set out in opinions such as those from which we have quoted. The practice of judicial control over transfers of custody, moreover, was already established when the first laws

were put on the books. What most of the new laws did, in effect, was to move this control from a time after trouble had commenced to the beginning of the process. . . . In short, the chances are that a full-fledged law of adoption—at least on its custodial side—would sooner or later have been developed either judicially or legislatively as a response, to use Mr. Justice Holmes' language, to the 'felt necessities of the times' and as an outgrowth of current practice even if there had never been a Roman law to which the learned could refer for support and prestige.

"But there was at least one more factor in the background of the general adoption laws that needs to be borne in mind—the practice of the legislatures of passing special acts providing for the adoption of particular children by particular adults. Strange though this practice may seem to us today, such enactments were not unusual. They were part of a larger pattern that had developed and, as such, can be put side by side with other special enactments granting divorces, for instance, and providing for the legitimization of children. How far back this practice runs has never, to the best of our knowledge, been investigated, but a spot-check of a few states indicates that by the time with which we are concerned it was probably quite general. In a very real sense the enactment of general adoption laws was but a generalization of this earlier practice—a generalization designed to open the doors to all comers, to relieve the legislatures of routine work, and to avoid the political and other hazards that frequently attend the legislative route." *Independent Adoptions,* (supra) pp. 28-29.

Thus, we submit, the advent of legal adoption laws in the nineteenth century was not the innovation the opinions of the Attorney General suggests. They were merely the codification and stabilization by an already existing and recognized condition.

That this condition had been recognized for many years before the Act of 1802 is readily deduced. This Court in *Boyd* v. *Nebraska,* 143 U.S. 135 at page 163 made the following remark:

> "All white persons or persons of European descent who was born in any of the colonies, or resided or had been *adopted* there, before 1776, and had adhered to the cause of independence up to July 4, 1776, were by the Declaration invested with the privileges of citizenship." *Boyd* v. *Nebraska,* 143 U.S. 135, 163. (Emphasis Supplied).

Thus it clearly appears that since the time of the Declaration of Independence, this country has equated the right of natural born persons with those of persons adopted. All authority tends to the conclusion that adopted children were within the intended purview of the Act.

We submit that in the absence of statutory definition, contemporary understanding of the status of adopted children supports our contention. That understanding is best reflected in the then existing laws.

In *United States* v. *Cruikshank,* 92 U.S. 542, the Supreme Court at Page 549 said:

> Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual welfare and the protection of their individual as well as their collective rights."

Plaintiff's rights as an adopted child were then established by the adoption laws of Michigan, the "political community to which they belong." The law then cover-

ing adoption in Michigan was Section 3 of the Compiled Laws of Michigan 1915 (Section 14142) which provided:

> "The person or persons so adopting such child shall thereupon stand in the place of a parent or parents to such child in law, and be liable to all the duties and entitled to all the rights of parents thereto, and such child shall become and be an heir at law of such person or persons, the same as if he or she were in fact the child of such person or persons."

This statute was an identical reinactment of Section 8780, 3 Comp. Laws of Michigan (4 How. Stat. (2nd Edition) Section 11640). The Supreme Court of Michigan under the prior identical law stated the extent of its interpretation in *Ultz* v. *Upham,* 177 Mich. 351, where it said at 355:

> "We are of opinion that the very language of the adoption statute refutes such claim for the reason that he 'thereupon becomes an heir at law of such person or persons, the same as if he or she were in fact the child of such person or persons.' Language could not well be stronger. We can see no difference between 'an heir at law' and a 'legal heir.'
>
> "This view is in accord with the holding of the supreme court of Illinois in *Butterfield* v. *Sawyer,* 187 Ill. 598 (58 N.E. 602, 52 L.R.A. 75, 79 Am. St. Rep. 246). The statute of that State provided that an adopted child should be regarded as if it had been born in lawful wedlock for the purposes of inheritance 'and other legal consequences and incidents of the natural relation of parents and children.' " *Ultz* v. *Upham,* 177 Mich. 351, 355.

Thus, plaintiff is "a child born without the United States", whose parent was naturalized during his minority. He *is a citizen* of the United States by virtue of the Act of March 2, 1907.

We are further supported in our contention by the later enacted statutes.

The first statute defining "child" in statutes governing nationality through naturalization is found in Section 101(h) of the Nationality Act of 1940, which provides:

> "(h) The term 'child' includes a child legimated under the law of the child's residence or domicile, whether in the United States or elsewhere; *also a child adopted in the United States,* provided such legitimation or adoption takes place before the child reaches the age of sixteen years and the child is in the legal custody of the legitimating or adopting parent or parents. (54 Stat. 1138; 8 U.S.C. 502.)" Emphasis Supplied).

Petitioner is directly within these definitions of "child". There is no reason to assume this definition reflects any radical change in pre-existing law, nor that it was intended to be other than definitive of the law as it existed.

CONCLUSION.

Wherefore, for the above and foregoing reasons, we respectfully submit that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the decision of that Court rejecting this Petitioner's claim to citizenship.

Respectfully submitted,

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ANNA R. LAVIN
Attorneys for Petitioner

APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM 1964, JANUARY SESSION 1965

No. 14399

ABRAHAM F. ZIMMERMAN,
Plaintiff-Appellant,
v.
JOHN M. LEHMANN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JANUARY 7, 1965

Before DUFFY, KILEY and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* Plaintiff (sometimes called applicant was born in Russia September 15, 1902. In September 1913, subsequent to the death of his parents, he and his two sisters came to the United States to join their uncle, Isadore Lande, at Fort Wayne, Indiana. At that time plaintiff was admitted for permanent residence, which status he has since continuously maintained, with the exception of three trips, subsequently discussed, which he made outside the country.

On November 8, 1955, a special inquiry officer of the Immigration and Naturalization Service found that plaintiff was an alien excludable from the United States under the provisions of Title 8 U.S.C.A. Sec. 1182 (a)(9), in that

he had been convicted of a crime involving moral turpitude, and also under the provisions of Title 8 U.S.C. Sec. 1182 (a)(20), as an alien who attempted to enter the United States without a visa or other proper documentation. From the order of exclusion plaintiff appealed to the Board of Immigration Appeals which, on March 8, 1956, affirmed the order.

On March 23, 1956, plaintiff filed the instant action in the District Court, by which he sought relief from the exclusion order. That Court allowed defendant's motion for a summary judgment, from which plaintiff appeals.

The Board of Immigration Appeals in affirming the exclusion order stated:

> "The applicant, an alien, is a 58-year old married male, a native and last a citizen of Russia, who has been a resident of the United States since 1913 when he was admitted for permanent residence; he has made several short visits outside the United States. In 1952, he made a visit to Canada and reentered in July 1952 on a claim of United States citizenship. On July 19, 1953, he went to Canada and upon his attempt to return on the following day, was held for a hearing but paroled into the United States to resume his residence with his citizen wife and children. The hearing was held; the applicant was found inadmissible on the grounds set forth above and excluded."

Of the numerous grounds urged for reversal, we think that presently we need be concerned with only two: (1) that plaintiff is a citizen of the United States, and (2) that his brief excursions outside the country's borders in 1952 and 1953 did not subject him to the consequences of "entry" on his return, under Sec. 101 (a)(13), Title 8 U.S.C.A. Sec. 1101 (a)(13) of the Immigration and Nationality Act of 1952. If either of these contentions is valid, the order under attack cannot stand.

In our consideration of the record we are mindful of the statutory admonition, "* * findings of fact, if sup-

ported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive." Title 8 U.S.C.A. Sec. 1105 (a)(6).

The special inquiry officer as a basis for his exclusion order found:

> "1. That the applicant is an alien, a native and citizen of the USSR;
>
> "2. That he entered the United States at New York, New York on September 29, 1913, at which time he was lawfully admitted for permanent residence;
>
> "3. That on January 20, 1939 he was convicted by the United States District Court for the Northern District of Illinois of the offense of attempting to defeat and evade income taxes in violation of Section 145 (b) of Title 26 of United States Code and Section 146 (b) of the Revenue Act of 1928;
>
> "4. That he entered the United States in July 1952 as a United States citizen at an unknown port in Maine on the border of Canada after a week's vacation in that country;
>
> "5. That the applicant applied for readmission to the United States for permanent residence at International Falls, Minnesota on July 20, 1953 and he was paroled into the United States pending a determination on his application for admission;
>
> "6. That he does not have a valid immigrant visa, reentry permit, border crossing identification card or other entry document."

Plaintiff's claim to citizenship is based on the premise that shortly after his admission for permanent residence he was legally adopted at Fort Wayne, Indiana, by his uncle, Isadore Lande, although he continued to use the name Zimmerman. In 1913, when plaintiff was twenty years of age, Isadore Lande became a naturalized citizen at Flint, Michigan. During the intervening years, plain-

tiff resided with his adoptive parent. Thus plaintiff argues that he as an adopted child acquired citizenship by reason of the naturalization of his adoptive parent.

The government asserts that inasmuch as this question was not raised in the District Court, it cannot be considered for the first time on appeal. We think to the contrary. The issue is jurisdictional inasmuch as the proceedings were instituted and the order of exclusion obtained on the basis that plaintiff was an alien, not a citizen.

Plaintiff's claim to citizenship is based upon the Act of March 2, 1907, Section 5 (Title 8 U.S.C.A. Sec. 8), which provides:

> "A child born without the United States of alien parents shall be deemed a citizen of the United States by naturalization of or resumption of American citizenship by the parent, wherein such naturalization or resumption takes place during the minority of such child. The citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."

In construing this provision we are not aided by any Federal case or legislative history. Plaintiff's theory is that "a child born without the United States" includes an adopted child, and that "by naturalization * * by the parent" includes an adoptive parent. Plaintiff argues with some plausibility that Congress in employing the terms "child" and "parent" must have had in mind the general rule announced by numerous State courts that the status between an adoptive parent and an adopted child is identical with that existing between a natural parent and his child. See 2 C.J.S. Sec. 55 (page 446). Even so, we doubt, certainly are not persuaded, that this general principle bears any relevancy to the Congressional purpose underlying the provision in question. Defendant cites two opinions of the Attorney General of the United States which hold that there is no statute which bestows American citizenship on adopted aliens. 38 Op. Atty. Gen.

217; 38 Op. Atty. Gen. 397. It is our view and we so hold that plaintiff did not become a citizen by reason of the premise asserted or otherwise.

In 1931, plaintiff left the United States for a six-week trip to Europe, and returned to this country the following year. It is conceded that this departure and return was legal and constituted no impairment to his status as a permanent resident alien.

The circumstances surrounding plaintiff's 1952 and 1953 visits to Canada form the basis for the order under attack. On July 20, 1953, at International Falls, Minnesota, he was stopped at the Canadian border by an immigration officer and refused admission. On the following morning a hearing was had during which plaintiff claimed that he was a citizen of the United States as the adopted child of his uncle, a naturalized citizen. Plaintiff was permitted to enter on parole, and the hearing was continued and later concluded in Chicago. Concerning the hearing at International Falls, the inspector in his report stated:

> "At his hearing at International Falls on July 21, 1953 the applicant testified that he was born in Proskuroff, Russia on September 15, 1902 and that he was a United States citizen by adoption. He stated that he first entered the United States at New York in September or October 1913. This entry was verified and the record establishes that he was admitted to the United States at New York on September 29, 1913 for permanent residence. The applicant testified that he has lived in the United States since his entry in 1913 except for three temporary absences. He stated that he made a six weeks' trip to Europe, leaving in the latter part of 1931 and returning to New York in January 1932; that in July 1952 he visitetd Canada for about one week; and that on July 19, 1953 he crossed into Canada for a period of less than twenty-four hours prior to his application for readmission at International Falls, Minnesota on July 20, 1953."

We note that in the main the information given by plaintiff at this hearing was later verified, other than his claim that he was entitled to admission as a citizen.

During the hearing at International Falls, plaintiff voluntarily revealed that in July 1952 he and his family visited in Canada and returned after a five-or six-day vacation. As we understand, defendant contends that this entry was illegal and that plaintiff forfeited his status as a resident alien. Relative to plaintiff's 1952 absence from the United States, the inspector in his report stated:

> "The applicant testified that he reentered the United States in July 1952 at an unknown port in Maine on the border of Canada; that he was questioned by an immigrant inspector; that he did not have any entry documents or passport; that he told the inspector that he was born in Russia and that he was a United States citizen; that the inspector asked how he acquired citizenship and that he stated he acquired citizenship by adoption; and that he did not recall any further questions."

Defendant in support of its exclusion order places great stress upon *United States ex rel. Volpe* v. *Smith,* 289 U.S. 422, which affirmed a deportation order sustained by this Court. 62 F. 2d 808. In that case the alien who sought reentry falsely stated that he was a naturalized citizen and that his papers were in Chicago. That was a statement of fact which the Court held constituted fraud and deceit, which disarmed the inspector and terminated the inspection. That is a far cry from the situation here where there is no contention that plaintiff made a false fraudulent or deceptive statement of fact. The opinion expressed by him related to a question of law, the resolution of which, as previously shown, is still in dispute. Plaintiff revealed to the inspector the true facts upon which he relied for his claim to citizenship. Even the officer who conducted the hearing at International Falls and detained plaintiff for further examination was in doubt as to his citizenship status, as is shown by his letter to plaintiff, dated July 20, 1953, "You do not appear to

me to be clearly and beyond a doubt entitled to enter the United States."

Since Volpe, the Supreme Court has evidenced an increasing concern toward the rights of aliens sought to be deported. In *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, the Court in construing a section of the Immigration Act stated (page 10):

> "We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo* v. *Carmichael*, 332 U.S. 388. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

Of more direct relevance to the instant situation is the recent decision in *Rosenberg* v. *Fleuti*, 374 U.S. 449, wherein the Court rejected the harsh definition of "entry" as had been previously employed in numerous cases, including Volpe. The Board of Immigration Appeals did not have the benefit of this case, which was decided June 17, 1963, long after the exclusion order. It is not revealed whether the decision in Fleuti, rendered eleven days prior to the judgment appealed from, was called to the District Court's attention.

In *Fleuti*, an alien who had been admitted to this country for permanent residence made a two-hour visit to Mexico. His return was held by the Immigration and Naturalization Service to constitute an illegal entry, and he was held to be deportable. Without discussing the case in detail, we think it sufficient to note that the Court in reversing the order of deportation held that the alien did not lose his status as a resident alien because of his trip to Mexico.

The Court was concerned with what constitutes an "entry" within the meaning of Sec. 101 (a)(13) of the Immigration and Nationality Act of 1952 (Title 8 U.S.C.A. Sec. 1101 (a)(13), and sets forth (page 452) the statutory definition of the term. It was particularly concerned with the "exception" language contained in that definition:

> "* * except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place * * was not intended or reasonably to be expected by him or his presence in a foreign port or place * *."

The Court reviewed numerous decisions which had applied the harsh rule announced in *Volpe, supra,* as well as the legislative history of the provision defining the term "entry." It also compared the exceptions found in Sec. 101 (a)(13) with the provision of the immigration laws defining what constitutes "continuous residence" for an alien wishing to be naturalized. The Court stated (page 459):

> "This enlightened concept of what constitutes a meaningful interruption of the continuous residence which must support a petition for naturalization, reflecting as it does a congressional judgment that an alien's status is not necessarily to be endangered by his absence from the country, strengthens the foundation underlying a brief that the exceptions to Sec. 101 (a)(13) should be read to protect resident aliens who are only briefly absent from the country."

The Court stated (page 461):

> "In making such a casual trip the alien would seldom aware that he was possibly walking into a trap, for the insignificance of a brief trip to Mexico or Canada bears little rational relation to the punitive consequence of subsequent excludability. There are, of course, valid policy reasons for saying that an

> alien wishing to retain his classification as a permanent resident of this country imperils his status by interrupting his residence too frequently or for an overly long period of time, but we discern no rational policy supporting application of a re-entry limitation in all cases in which a resident alien crosses an international border for a short visit. Certainly if that trip is innocent, casual, and brief, it is consistent with all the discernible signs of congressional purpose to hold that the 'departure * * was not intended within the meaning and ameliorative intent of the exception to Sec. 101 (a)(13).' "

And further (page 462):

> "We conclude, then, that it effectuates congressional purpose to construe the intent exception to Sec. 101 a()(13) as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence."

We think the Court's reasoning is pertinent, in fact controlling, in the instant situation. At the time of his 1952 visit to Canada, plaintiff had continuously maintained his status as a resident alien for some thirty-nine years. He was married to an American citizen, had three minor children who were born in this country, all dependent upon him for support, and had a residence and business in Chicago. From the fact that he took his family on a harmless, innocent vacation trip to Canada, it would border on the absurd to ascribe to him an intention of impairing his status as a permanent resident of this country.

In *Wadman* v. *Immigration and Naturalization Service*, 329 F. 2d 812 (9th Cir.), one of the questions considered in a deportation proceeding was whether the alien was entitled to certain discretionary relief which depended upon a continuous residence in this country for a period of seven years. The Service had denied such relief on the ground that the alien's continuity of residence had been interrupted by a ten-day vacation trip, five days of

which were spent in Mexico. The Court on the strength of Fleuti reversed the Board of Immigration Appeals on this point and stated (page 816):

> "The problem in Fleuti, upon which the court divided, was whether a voluntary and knowing departure could nevertheless be found to be 'not intended.' Upon this the court, at page 462, construed the intent required as one 'to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence.' The law, it concluded, 'protects the resident alien from unsuspected risks and unintended consequences of such a wholly innocent action.' * * * In our judgment the term 'continuous' is no more subject to a hard and fast construction than is the term 'intended.' The question is whether the interruption, viewed in balance with its consequences, can be said to have been a significant one under the guides laid down in Fleuti."

For the reasons stated, it is our judgment and we so hold that plaintiff in returning to the United States from Canada on the occasion of either the 1952 or 1953 trip did not make an illegal "entry" within the meaning of Sec. 101 (a)(13) of the Immigration and Nationality Act of 1952. It follows that his status as a resident alien was not impaired.

The judgment is reversed and the cause remanded for such further proceedings as may be consistent with this conclusion.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60610

Thursday, January 7, 1965

Before
Hon. F. Ryan Duffy, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. J. Earl Major, Circuit Judge

No. 14399
ABRAHAM F. ZIMMERMAN,
Plaintiff-Appellant,
v.
JOHN M. LEHMANN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, and that this cause be, and it is hereby Remanded to the said District Court for such further proceedings as may be consistent with the opinion of this Court filed this day.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1041

ABRAHAM F. ZIMMERMAN, PETITIONER

v.

JOHN M. LEHMANN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 339 F. 2d 943.

JURISDICTION

The judgment of the court of appeals was entered January 7, 1965. The petition for a writ of certiorari was filed April 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The court of appeals found that petitioner was improperly excluded from the United States after a trip to Canada, because his return to the United

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States did not constitute a new "entry" under *Rosenberg* v. *Fleuti*, 374 U.S. 449. The court rejected on the merits petitioner's alternative argument as a bar to exclusion—that he had acquired derivative citizenship on the naturalization of an uncle who, petitioner claimed, had adopted him. The question presented is whether this Court should grant review to determine whether petitioner's alternative argument would be correct and applicable if he could show that he was in fact adopted as claimed.

STATEMENT

Petitioner, who was born in Russia in September 1902, entered the United States as a permanent resident in 1913, after the death of his parents, to join his uncle, Isadore Lande, at Fort Wayne, Indiana (R. 42–43). In 1953, after a trip to Canada, he was excluded from the United States as an alien not entitled to admission (R. 47, 73). After a hearing (during which he was paroled into the United States) he was found excludable by a Special Inquiry Officer (R. 29–40) whose decision was upheld by the Board of Immigration Appeals (R. 74–76). The order of exclusion was upheld by the District Court for the Northern District of Illinois (R. 20–27) but reversed by the court of appeals on the ground that petitioner's return to the United States after his trip to Canada did not constitute an "entry" within the meaning of Section 101(a)(13) of the Immigration and Nationality Act of 1952 as interpreted by this Court in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (Pet. App. 1a–10a).

At the exclusion hearing, petitioner claimed that he

had been adopted by his uncle, Isadore Lande, at Fort Wayne, Indiana, although he had never used the name of Lande (R. 43) and had no record of the adoption (R. 68). He said he had been advised of the adoption by his uncle at a time which he variously placed as 1935–1938 (R. 72) and six or seven years before the hearing (R. 68). On the basis of counsel's information, he placed the date of the alleged adoption in the fall of 1913, stating that the matter had been handled through a firm of lawyers, called Ryan and Ryan, of Fort Wayne, Indiana (R. 71). He at first said that his uncle was a citizen at the time of his adoption (R. 44), but subsequently, on the basis of information which counsel had obtained from a cousin, said his uncle had been naturalized on June 13, 1923, at Flint, Michigan, No. 1716512, Vol. 8 (R. 71).

Petitioner claimed that he had travelled to Europe in 1931 on an American passport (R. 45), but it was shown that the document was a certificate of identity (R. 57). He had been admitted to the United States in 1932 as a returning resident alien (R. 53). It was also shown that in 1927 petitioner had filed first papers for naturalization (R. 59) and in 1932 a petition for naturalization (R. 60), which was denied (see R. 31).

In holding petitioner excludable, the special inquiry officer stated that there was no provision of law by which citizenship was conferred on a child by reason of his adoption by a United States citizen (R. 31). On the basis of the various inconsistencies in petitioner's testimony, the documents as to his reentry in

1932, and his application for naturalization, the officer concluded that petitioner knew or had reason to believe that he was not a United States citizen when he entered the United States in 1953 (R. 37).

In his amended complaint in the district court, petitioner alleged that he was a native of Russia and "is now stateless" (R. 4). The district court therefore had no reason to pass on petitioner's claim of citizenship through adoption. In the court of appeals, however, petitioner did assert a claim of United States citizenship. The court of appeals undertook to pass on the issue because it was "jurisdictional inasmuch as the proceedings were instituted and the order of exclusion obtained on the basis that plaintiff was an alien, not a citizen" (Pet. App. 4a). It held, primarily on the basis of two opinions of the Attorney General (38 Op. Atty. General 217 and 397), that there was no statute which bestowed American citizenship on adopted minor aliens on the naturalization of their adoptive parents. The court of appeals therefore had no occasion to consider the factual issue as to whether petitioner had actually been adopted. Turning to the merits of the controversy, the Seventh Circuit held for petitioner, finding that petitioner's return from a trip to Canada did not constitute an "entry" under this Court's holding in *Rosenberg* v. *Fleuti*, 374 U.S. 449, and that therefore the order of exclusion was erroneous.

ARGUMENT

The court of appeals has held that petitioner's exclusion from the United States was improper. Thus

the particular issue which gave rise to the present proceeding—the excludability of petitioner—has been determined. Petitioner nevertheless asks this Court to pass on his claim that he acquired citizenship under the Act of March 2, 1907, by virtue of the naturalization in 1923 of his uncle, Isadore Lande, who allegedly adopted him in Indiana in 1913. We submit that review of the question of petitioner's citizenship in this context is unwarranted, not only because the exclusion proceeding against petitioner has been terminated in his favor, but also because review would involve deciding an intricate issue of statutory construction on a record lacking in substantial evidence that petitioner was in fact adopted.

Petitioner asks this Court to overrule an interpretation of the 1907 Act which was formalized by an opinion of the Attorney General in 1935, and on the basis of which Congress legislated in 1940. Section 316 of the Nationality Act of 1940 (54 Stat. 1146) made specific provision for the naturalization of an adopted child under 18 years of age on the petition of his adoptive citizen parents if the child had been lawfully admitted to the United States for permanent residence, adopted in the United States before reaching 16, and in the legal custody of the adoptive parents for at least two years prior to the filing of the petition for naturalization.[1] The legislative history of the 1940 Act, which was the result of a comprehensive study by representatives of the Departments of State, Labor and Justice, shows that the

[1] This has been carried over with additions as Section 323 of the 1952 Act, 8 U.S.C. 1434.

draftsmen of that legislation were of the opinion, which they conveyed to Congress, that no law of the United States then provided for the naturalization of an adopted child through the naturalization of his adoptive parents. See Hearings before the Committee on Immigration and Naturalization of the House of Representatives, on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess., pp. 93, 362–363, 445–446. Under these circumstances, we think it is inappropriate for petitioner to ask this Court to decide a highly technical question of statutory construction (which, in view of the years that have elapsed and the enactment of the 1940 Act, cannot have any wide application) on the basis of a record which leaves so much doubt as to the factual predicate of petitioner's claim—his allegation that he was in fact adopted by his uncle.

There is nothing in the record before this Court, except petitioner's vague testimony that his uncle so told him, to show that petitioner was in fact adopted by his uncle. It is significant that petitioner was able, with counsel's assistance, to specify the exact time and place of his uncle's naturalization, but was unable to give any specific facts as to his adoption except that it was handled by a firm of lawyers in Fort Wayne, Indiana. The laws of Indiana in effect in 1913[2] provided for a petition for adoption in the applicable circuit court of the county; it should have been possible for petitioner, who had the name of the lawyers who allegedly handled the matter, to get

[2] Those laws are set forth as notes to Burns, Indiana Stat. Ann. 1933, 3–101.

the name and number of the proceeding and a record of his adoption. Indiana law provided that, on an appropriate finding, the court "shall make an order that such child be adopted, and from and after the adoption of such child, it shall take the name in which it is adopted." Yet petitioner testified that he never used his uncle's name. The record shows that petitioner traveled as an alien in 1931 and 1932 and that he applied for naturalization in 1932 (when he was 29 years old). Under these circumstances, there is no reason to credit petitioner's claim that he was in fact adopted. It is significant in this connection that the complaint in the district court, filed by the same attorneys who represented petitioner at the hearing before the Special Inquiry Officer, alleged that petitioner "although a native of Russia, is now stateless" (R. 4).

Petitioner is presently in the United States. He is not without remedy to establish a factual predicate for his present claim if it exists. Under Section 341 of the Immigration and Nationality Act of 1952, he may apply for a certificate of derivative citizenship on an adequate factual showing. The doctrine of collateral estoppel will not bar relitigation of the question of citizenship—an issue whose resolution was not "essential to the decision" below. *Yates* v. *United States,* 354 U.S. 298, 336. If his claim is denied on legal grounds, he may then seek judicial review of that legal issue. This Court should not now be asked to overturn a long-standing interpretation of the 1907 Act when there is no showing that petitioner has a factual basis for challenging that interpretation.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

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BEATRICE ROSENBERG,
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